IN THE

Supreme Court of the United States

October Term, A. D. 1938.

No. 227.

Inland Steel Company, *Appellant*,

v.

The United States of America, Interstate Commerce Commission and Indiana Harbor Belt Railroad Company.

No. 228.

Chicago By-Product Coke Company, *Appellant*,

v.

The United States of America, Interstate Commerce Commission, The Belt Railway Company of Chicago, et al.

Appeals from the District Court of the United States for the Northern District of Illinois.

BRIEF FOR APPELLANTS.

Nuel D. Belnap,
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December 12, 1938.

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Appeals from the District Court of the United States for the Northern District of Illinois.

BRIEF FOR APPELLANTS.

OPINION OF THE COURT BELOW.

The opinion of the District Court has been reported in 23 F. Supp. 291 and is set out in full at pages 81-92 of the printed record. Appellants' motions to modify the Court's decrees were denied without opinion and the orders denying the motions are set out on pages 101 and 175 of the printed record.

JURISDICTION.

Paragraph 1 of Rule 12 has been complied with and on October 10, 1938, this Court entered orders noting probable jurisdiction.

STATUTES INVOLVED.

In conformity with Rule 27, the language of those sections of the Interstate Commerce Act which are involved in this appeal is set forth in full in an appendix hereto.

STATEMENT OF THE CASE.

These are direct appeals from the final decrees entered by a statutory three judge court sitting in the Northern District of Illinois, and from the subsequent orders of that court denying appellants' motions to modify those final decrees. The two cases were taken on final hearing at the same time and the two decrees (R. 93, 135) and orders denying appellants' motions for modification (R. 101, 175) are, in terms and conditions, identical. The findings of fact and conclusions of law of the District Court were reported together under one title (R. 81-92); the two appeals which were prayed and allowed are presented on separate records, which have been printed under one cover.

There is no relationship or privity between the two appellants, and the cases are covered by one brief and will be argued together for convenience and brevity only.

Appellants own and operate two industrial plants which are served by the railroads named as appellees herein. These carriers, instead of themselves doing the work of switching and spotting cars at the loading and unloading points within appellants' plants, have for many years employed appellants to do this work and, in return therefor, have published in tariffs filed with the Interstate Commerce Commission specific allowances out of the established freight rates, as authorized in paragraph 13 of section 15 of the Interstate Commerce Act. Typical of these tariffs is that of the Indiana Harbor Belt Railroad Company, which

was published to become effective April 15, 1933, and provided (R. 98):

"On all carload shipments (including trap cars containing 6,000 pounds or more of less carload freight) destined to or coming from the plant of the Inland Steel Company at Indiana Harbor, Ind., the terminal switching service is performed by the Inland Steel Company for account of the Indiana Harbor Belt Railroad Company. Such terminal switching service, for which this allowance is made, consists of the handling of the cars between the point of interchange of such cars with this company and the point at which such cars are unloaded or the point at which such cars are loaded in said plant.

"For such terminal service performed for the Indiana Harbor Belt Railroad Company by the Inland Steel Company at Indiana Harbor, Ind., the Inland Steel Company will be allowed $1.85 per loaded car which will include the handling of the empty cars in the reverse direction.

"This allowance is not in excess of the average actual cost of the service as disclosed in a joint study of the operation of the plant facility made during the year 1927, and filed with Interstate Commerce Commission."

In 1931, the Interstate Commerce Commission instituted on its own motion an investigation into the aforementioned practice, which at that time was widespread, in a proceeding known as Ex Parte 104, *Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services.* Subsequently, the Commission entered its report, 209 I. C. C. 11 (R. 14), wherein the Commission reviewed the facts and announced its views as to the practices which it regarded as proper. No order was attached to this report, but in fifty-seven separate supplemental reports, issued during the ensuing year, the Commission dealt specifically with the situation at individual industrial plants and entered orders directed thereto. Among these were the following reports affecting the appellants:

Inland Steel Company Terminal Allowance, 209 I. C. C. 747 (R. 66).

Chicago By-Product Coke Company Terminal Allowances, 216 I. C. C. 8. (R. 118.)

In each of these reports, the Commission found that the movement of cars for which the railroads had been paying the appellants was beyond the duty of the railroads to perform under the established rates, and that therefore by the payment of allowances for that service the carriers provided the means by which the respective industries enjoyed a preferential service not accorded to shippers generally.

To these supplemental reports were attached orders requiring the three railroads for the future to cease paying the allowances to the respective appellants. (R. 70, 124.)

CHICAGO BY-PRODUCT COKE COMPANY.

The order affecting appellant in No. 228, Chicago By-Product Coke Company, was entered by the Commission on May 28, 1936, originally to become effective July 17, 1936. (R. 124) In compliance therewith, the two carrier defendants[1] published supplements to their tariffs, canceling the allowances in conformity with the Commission's cease and desist order. (R. 142, 161)

On June 30, 1936, however, before the cease and desist order became effective, the Commission entered an order postponing the effective date thereof, until October 15, 1936; the carriers correspondingly immediately published further supplements postponing the cancellation of the allowance tariffs, and leaving them in effect. (R. 143, 164) Thereafter, appellant, Chicago By-Product Coke Company, filed its petition in the District Court on September 2, 1936, to enjoin, set aside and annul the aforesaid report and order of the Commission. (R. 105)

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[1] Belt Railway of Chicago and Chicago & Illinois Western, a subsidiary of the Illinois Central. The Illinois Central itself has not served the plant (R. 136).

Immediately thereafter, on September 10, 1936, to maintain the *status quo*, the Commission further postponed the effective date of its cease and desist order, (R. 133) and the carriers further postponed the cancellation of the allowances. (R. 144, 165)

On December 2, 1936, a statutory District Court of three judges, after hearing upon the application of appellant for an interlocutory injunction, entered such an injunction providing (R. 131):

> "Now, therefore, *it is ordered* that during the pendency of this matter the United States of America and the Interstate Commerce Commission be and they are hereby restrained and enjoined from taking any steps for the enforcement and execution of the aforesaid report and order entered the 28th day of May, 1936, in said Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, insofar as the same apply to plaintiff, Chicago By-Product Coke Company, and the said report and order are suspended, stayed, and set aside, pending the further order of the court.
>
> "*It is further ordered,* That until the further order of the Court, The Belt Railway Company of Chicago, Chicago & Illinois Western Railroad, and Illinois Central Railroad Company are authorized and directed to withhold payments of the allowances covered by their tariffs to the plaintiff, Chicago By-Product Coke Company."

On February 26, 1937, the Commission entered a further and final order postponing the effective date of the cease and desist order to June 15, 1937. (R. 133) In the meantime, by further supplements to the allowance tariffs, the carrier defendants maintained the application of the original allowance tariffs either by postponing the cancellation thereof or by republishing the tariffs. (R. 144-145, 168)

The cease and desist order of the Commission dealing with the plant of appellant in No. 227, Inland Steel Company, was entered July 11, 1935, to become effective September 3, 1935. (R. 71) Appellant filed its petition in the District Court on August 5, 1935, (R. 1) and on August 28, 1935, the statutory District Court of three judges entered an injunction restraining the enforcement of the Commission's cease and desist order. (R. 78-80)

On February 26, 1937, the Commission entered a further order (R. 96) postponing the effective date of its cease and desist order involved in No. 227 to June 15, 1937, the same date upon which the cease and desist order in No. 228 was finally to become effective. (R. 80) Likewise, the Indiana Harbor Belt Railway Company, sole carrier involved in No. 227, which had previously published a cancellation supplement to the condemned allowance tariff in conformity with the Commission's cease and desist order, (R. 99) filed a further supplement postponing the cancellation of the allowance tariff indefinitely. (R. 100)

The cases were taken on final hearing at the same time and on April 27, 1938, the District Court entered final decrees setting aside the interlocutory injunctions and demissing the bills of complaint for want of equity. The decrees further provided that the carrier defendants should retain all sums which became payable under the terms of the allowance tariffs and which were set up by the carriers on their books of account pursuant to the interlocutory injunctions. (R. 93, 135)

On May 25, 1938, appellants filed with the District Court two similar motions to modify these final decrees insofar as they directed the carriers to retain the allowances set up on their accounts. (R. 94, 136) These motions were submitted on brief and were both denied without opinion by orders dated June 13, 1938. (R. 101, 175)

SPECIFICATION OF ASSIGNED ERRORS URGED HEREIN.

The following assignments of error are relied upon. (R. 180-5)

The Court erred:

1. In ordering in its final decrees that all sums, which pursuant to the terms of the allowance tariffs of the carrier defendants (appellees) herein would have been payable to the plaintiffs (appellants) since the date of the orders of interlocutory injunction entered by that Court and which sums have been, pursuant to the last paragraph of said interlocutory injunctions, set up by said carriers on their books of account, subject to the further order of said Court, shall be retained by said carriers as a part of their general funds and said accounts cancelled.

2. In failing and refusing to authorize and direct the carrier appellees herein to pay over to the appellants all sums which, pursuant to the terms of the published tariffs of the carrier appellees, have become due and owing to the appellants since the date of the said interlocutory injunction.

3. In entering the order of June 13, 1938, denying the motions of appellants to modify the final decrees (a) by striking therefrom that portion of paragraph 1 of said decree which reads as follows: "and that all sums, which pursuant to the terms of the allowance tariffs of the carrier defendant herein would have been payable to the plaintiff since the date of said interlocutory injunction and which sums have been pursuant to the last paragraph of said interlocutory injunction set up by said carrier on its books of account, subject to the further order of this Court, shall be retained by said carrier as a part of its general funds and said account canceled," and (b) by entering its further order directing the appellees, to account for and pay over to appellants all sums which have become payable pursuant to the allowance tariff.

4. In that the final decrees in substance and result set aside and nullify the provisions of tariffs voluntarily published by the appellee carriers and filed with the Interstate Commerce Commission, in accordance with Section 6 of the Interstate Commerce Act.

5. In that the final decrees in substance and result make effective certain orders of appellee Interstate Commerce Commission, prior to the effective date of said orders as provided therein or as later postponed by further orders of said Commission.

6. In that the decrees, in authorizing and directing the carriers to withhold payments to appellant, were not supported by any evidence or by findings of fact or conclusions of law by the Court, required by Equity Rule 70½.

POINTS AND AUTHORITIES.

I.

A railroad tariff published and on file with the Commission has the force of a statute and binds both shipper and carrier.

> Interstate Commerce Act, Section 6, paragraphs (3) and (7).
> *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U. S. 155, 67 L. ed. 183 (1922).
> *Pennsylvania R. Co.* v. *International Coal Min. Co.*, 230 U. S. 184, 57 L. ed. 1447 (1913).
> *Texas & Pacific Ry. Co.* v. *Mugg*, 202 U. S. 242, 50 L. ed. 1011.
> *Gulf C. & S. F. R. Co.* v. *Hefly*, 158 U. S. 98, 39 L. ed. 910.
> *A. J. Poor Grain Co.* v. *C. B. & Q. Ry. Co.*, 12 I. C. C. 418.

II.

The Interstate Commerce Commission has exclusive power to fix railroad rates or practices for the future.

> *Mitchell Coal & C. Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 57 L. ed. 1472 (1913).
> *Texas & P. R. Co.* v. *Abilene Cotton Oil*, 204 U. S. 425, 51 L. ed. 553 (1907).

Robinson v. *Baltimore & O. R. Co.*, 222 U. S. 507, 56 L. ed. 288 (1912).
Southern R. Co. v. *Tift*, 206 U. S. 428, 51 L. ed. 1124 (1907).
J. C. Famechon v. *Northern Pac. R. Co.*, 23 F. (2d) 307 (1927).
Chicago, B. & Q. R. Co. v. *Merriam & Millard Co.*, 297 F. 1 (1924).

III.

An order of the Commission can take effect only *in futuro*, as prescribed in the order and modified by the Commission and the Courts have no power to advance the effective date thereof.

Section 15 (2) of the Interstate Commerce Act.
United States v. *Baltimore & O. R. R. Co.*, 284 U. S. 195, 76 L. ed. 243 (1931).

IV.

A report of the Commission is not self executing and the Courts have no power to put it into effect in the absence of an effective order based thereon.

American Sugar Refining Co. v. *Delaware L. & W. R. Co.*, 207 F. 733 (1913).
North American Co. v. *St. Louis & S. F. Ry. Co.*, 288 F. 612 (1922).

SUMMARY OF ARGUMENT.

In ordering, in the final decrees, that all sums which were due appellants under the terms of the allowance tariffs during the period subsequent to the interlocutory injunctions should be retained by the carriers and not paid over to the respective appellants, the District Court went beyond the issues properly before it and took action as to which its jurisdiction had not been invoked.

In doing so, the Court acted without any evidence before it of material facts affecting that phase of the case, and the decrees are not supported by any evidence whatsoever.

Furthermore, the Court did not enter the required conclusions of law or findings of fact necessary to support that feature of the decrees.

The Court exceeded its powers in setting aside and annulling the express provisions of published railroad tariffs on file with the Interstate Commerce Commission and in force under section 6 of the Interstate Commerce Act.

Tariffs of the railroads published and filed with the Commission have the force and effect of statute and are binding on the shipper, the carrier, the courts, and the Commission until lawfully canceled.

The power to prescribe a change in rate or transportation practice for the future, which the Commission exercised in its cease and desist orders, is a legislative function exclusively within the jurisdiction of the Commission, and the courts have no independent similar power.

Orders of the Interstate Commerce Commission can take effect only *in futuro*, as of the date which the Commission fixes, or as postponed by the Commission, or unless set aside by a court. And in enforcing an order of the Commission, the courts have no power to modify, add to, or detract from the order entered by the Commission.

Therefore, the decrees are not a valid exercise of the court's jurisdiction to enforce orders of the Interstate Commerce Commission, because the effect of the decrees is not consistent with the mandate of the orders, but have the effect of enforcing the orders retroactively, prior to the date upon which the Commission directed the change in practice to become effective.

ARGUMENT.

This Court is familiar with the general problem of railroad terminal practices, with which the Interstate Commerce Commission dealt in the investigation underlying the orders which were attacked in these suits. The validity of its various orders has been settled through the previous

decisions of this Court, and appellants do not here question the decrees of the District Court insofar as they vacate the interlocutory injunctions and dismiss the bills of complaint.

The orders of the Interstate Commerce Commission which were the subject of these suits were only two of many similar cease and desist orders entered pursuant to the same underlying proceedings before that Commission. Many of these orders were attacked by the industries whose plants were affected thereby and numerous permanent injunctions were entered by statutory three judge courts sitting in various districts. The first of these decrees to be appealed to this Court by the Interstate Commerce Commission was in *United States v. American Sheet & Tin Plate Co.*, 301 U. S. 402, 81 L. Ed. 1186 (1937). In that case this Court reversed the decision of the District Court, and ordered the suits dismissed, in effect sustaining the findings and orders of the Commission. In *Pan American Petroleum Corp. v. United States of America, et al.*, 304 U. S. 156, 82 L. ed. 784, the Court again had before it appeals from similar decrees entered in Louisiana and Texas. It likewise reversed those decisions, and in so doing further defined the evidence necessary to support orders in these cases.

The above cited cases are indisputable authority for the decrees of the District Court in these cases insofar as those decrees vacate the interlocutory injunctions and dismiss the bills of complaint. However, the District Court not only dismissed the suits but it went further and directed the carriers to cut off payment of the allowances as of the dates of the interlocutory injunctions, despite the fact that the published tariffs had not been cancelled but continued in force providing for such allowances. On this appeal appellants assert that in so doing, the District Court erred, and that it was in no sense supported in this action by the decision of the Supreme Court in the *American Sheet & Tin Plate Company* case, *supra*, upon the sole authority of

which it decided these cases. The question here presented never arose in those cases, for upon the reversal of its decision by the Supreme Court, the District Court at Pittsburgh which had decided the *American Sheet & Tin Plate* cases simply dismissed the bills of complaint and set aside the injunctions. The Court in those cases had made no attempt to control the operation of the tariffs, but simply restrained enforcement of the orders, and the result was that the allowances had been paid in accordance therewith until finally cancelled in compliance with the Commission's orders.

I.

The District Court Exceeded Its Jurisdiction.

We submit that the decrees above discussed in *United States* v. *American Sheet & Tin Plate Co.*, were proper models for the District Court in the present cases, and that the District Court should have done no more than *vacate* its interlocutory injunctions and dismiss the bills. In going further to order the carriers to retain money due the industries under the terms of the allowance tariffs, the Court committed errors of law, which we shall develop herein; the Court also exceeded its jurisdiction.

The suits were brought under authority of the special statute[2] to set aside, enjoin and annul cease and desist orders of the Interstate Commerce Commission. Only the United States and Interstate Commerce Commission pleaded to the complaints; and with one exception, none of the carriers named as defendants entered an appearance. In their answers filed in each of the cases, the Commission and the United States limited themselves to defending the affirmative complaints. There was no prayer seeking enforcement of the Commission's orders and no cross-complaint was filed.

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[2] (38 Stat. L 219; 28 U. S. C. A. Sec. 41 Sub (28) and Sec. 45, 46 and 47). urgent Deficiencies Act of October 22, 1913.

Under these circumstances, the jurisdiction of the Court was invoked only to decide the issues before it and it erred in voluntarily taking jurisdiction for the purpose of enforcing the Commission's order.

II.

The Decrees Are Not Supported by Any Evidence or by Requisite Findings of Fact and Conclusions of Law.

Equity Rule 70½, promulgated June 2, 1930, to take effect October 1, 1930, provides in substance that the Court of first instance shall find the facts specially and state separately its conclusions of law thereon in deciding suits in equity. This, the District Court did not do insofar as that feature of the decrees from which we are here appealing is concerned, nor as to the final orders dismissing appellants' motions to modify those decrees. This delinquency is perhaps not in and of itself ground for reversing the action of the District Court, although a clear basis for remanding. It further exemplifies the fact that this feature of the case did not receive the same consideration that the Court gave to the primary issues concerning the validity of the Commission's cease and desist orders. Furthermore, this delinquency has two results and is the clue to two indications of error:

First, it should be noted that, because of the Court's failure to make the specific findings of fact and its conclusions of law required by Equity Rule 70½, this Court is deprived of the clear understanding of the basis for the decision below which the rule was intended to afford. *Shellman* v. *Shellman*, 95 F. (2d) 108 (1938). Consequently, in reviewing the decrees and orders from which this appeal is taken, it will be necessary to resort to some speculation as to the possible grounds upon which such action might have been founded.

Second, when consideration is given to the possible grounds upon which the Court may have considered its

decrees to be well founded, it will be seen that there was a total lack of evidence before the Court as to any of the facts which would be material to the applicability of the equitable principles there involved. We point out below the significance of this deficiency in the record, when we come to consider the principle of restitution.

III.

The District Court Has No Power to Vary the Terms of a Tariff.

Whatever may have been the reasons underlying its decrees, the essential and primary error into which the District Court fell was that it directed the carrier appellees to ignore their published tariffs and withhold the allowances for which they provided. These tariffs were at all times in full force and effect, although the various carriers showed their readiness to comply with the Commission's cease and desist orders, whenever they should become effective, by filing cancellation supplements which were postponed or withdrawn from time to time as the matter was held in abeyance by the Commission's postponements of its orders or the filing of suits in the District Court. As such, these tariffs were binding upon the shipper and carrier alike, and have the force of a statute, which the District Court has no power to alter or set aside.

This proposition follows from the express provisions of Section 6(3) and 6(7) of the Interstate Commerce Act, which provide in substance that there shall be no departures from or changes made in the rates and charges which have been filed and published by any common carrier, except and until the proposed changes have been similarly published and filed.

This Court has given effect to this mandate in many situations, some of which gave strong reason for a departure from the tariffs. Thus in *Keogh* v. *Chicago & N. W. R. Co.,* 260 U. S. 156, 67 L. ed. 183 (1922), the Court required

adherence to the legally published tariffs even in the face of a charge that the tariff rate was established through an illegal combination of carriers in violation of Section 7 of the Anti-Trust Act. The Court held that the unlawful combination had violated no legal right of the plaintiff and observed at page 163:

> "The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights, as defined by the tariff, cannot be varied or enlarged by either contract or tort of the carrier."

It has repeatedly been held that the carrier cannot, under any circumstances, charge any rate other than that published in its tariffs. In *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 57 L. ed. 1446 (1913), the Court said at page 197:

> "The statute required the carrier to abide absolutely by the tariff. It did not permit the company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little, and insist upon a larger sum being paid by the shipper. (Citations.) The tariff, so long as it was in force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike."

The Commission itself has stated the law in one of its landmark decisions, *Poor Grain Co. v. C., B. & Q. Ry. Co.*, 12 I. C. C. 418, in this language:

> "A rate, so long as it remains uncanceled, is as fixed and unalterable either by the shipper or by the carrier as if that particular rate had been established by a special act of the Congress. When regularly published, it is no longer the rate imposed by the carriers, but the rate imposed by the law."

The foregoing language, frequently quoted and never questioned, was based on the prior decisions of the Supreme Court in *Texas & Pacific Ry. Co.* v. *Mugg,* 202 U. S. 242, 50 L. ed. 1011 (1906), and *Gulf, C. & S. F. R. Co. v. Hefley,* 158 U. S. 98, 39 L. ed. 910 (1895).

We anticipate that counsel for appellees may seek to avoid the force of the foregoing principles of law; they cannot deny them. And the fact that the tariffs which the District Court nullified by its decrees were allowance tariffs does not affect the applicability of those principles. Railroad tariffs are of many kinds and the sanctity of what may be described as a concessionary tariff, such as tariffs providing for transit privileges or allowances, is equal to that of the more familiar rate tariff, naming rates for the conveyance of property. The charges to which Section 6 (3) and (7) of the Act refer must of necessity be arrived at through application of the freight rate tariff *and* whatever terminal, transit, or allowance tariffs apply. Neither the shipper, the carrier nor a court has the power either to restrain collection of the tariff rates or to restrain payments required to be made by the terms of allowance tariffs.

For this reason the District Court not only did not have power in its decrees to require the carriers to retain payments due under the allowance tariffs, but it did not at the time of the interlocutory injunction have the power to direct the carriers to retain the allowances while those tariffs remained in effect.

It may possibly be contended by opposing parties that the propositions above stated are not sound or applicable where the railroads were restrained by the interlocutory injunction from making changes in rates which they would otherwise have made, and it may be asserted that this is such a case. It is not necessary to consider whether or not such a contention would be valid if asserted in a case, where, upon the issuance of an interlocutory injunction, the carriers did no more than to give public notice that the

operation of their tariffs had been enjoined or suspended by this Court. In this case the carriers did more, that is, they vountarily filed with the Commission supplements in conformity with Section 6 of the Act, which extended the effective date of the cancellation of the allowances; that evidences voluntary action and definitely fixes the obligation of the carriers under the tariffs. The force and effect of that action is not lessened, even though reference is made in the tariffs to the action of this Court in issuing the interlocutory injunction, as we shall develop more fully below, in connection with the question as to whether this case is one in which the principle of restitution may apply.

IV.

The Allowances Are Not Rebates Which the Court Might Properly Order Withheld.

The action of the District Court at the time of the interlocutory injunction in requiring the carriers to withhold payment of the allowances, and later in decreeing that the allowances so withheld should be retained, would only be lawful and within the power of the Court if the allowances as of the date of the interlocutory injunction were illegal allowances in the sense of not conforming to tariffs lawfully on file with the Commission pursuant to the requirements of Section 6 of the Act.

Counsel for the appellees argued on brief before the District Court that the allowances were unlawful *per se*, and the action of the Court seem to indicate that the Court felt it was dealing with a rebate.

However, the very fact of the existence of the allowance tariffs forecloses any such claim of rebating, since the very nature of a rebate is an unauthorized departure from the tariffs. If a tariff provides for a definite payment to the shipper out of the rates, then the payment is not to be regarded as a "concession" and cannot be a rebate. This follows from the very language of section 6 (7), which provides:

> "nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property * * * than the rates, fares, and charges which are specified in the tariff filed and in effect at the time."

Unless it can be said that the rate named in the tariff is a rebate from the tariff, we submit that there is no room for any contention that the allowance tariffs were in any sense violative of Section 6 or that they were not in good form. Inexplicably however, counsel for appellees argued to the District Court that a violation of Section 6 was the very basis for the Commission's orders as sustained by this Court in *United States* v. *American Sheet & Tin Plate Co., supra.*

We submit that this argument is extremely ill taken in the face of the holding of this Court regarding the contention of the industries in that case that the allowances were not unlawful refunds or rebates under Section 6 so long as lawfully published in the tariff. The Court there said, p. 1190:

> "If the findings were limited to the practices specified in the sections mentioned [Sections 6 and 15] the position of the appellees would no doubt be sound, but the Commission has, in each case, found that the interchange tracks of the respective industries are reasonably convenient points for the receipt and delivery of interstate shipments and that the industry performs no service beyond those points of interchange for which the carrier is compensated under its interstate line-haul rates. These findings are an adjudication by the Commission that the spotting service within the appellees' plants is not transportation service which the carriers are bound to render in respect of receipt and delivery of freight."

Thus, the basis upon which the Commission's orders were sustained in those cases was the legislative power of the Commission to fix the transportation service to be provided under the line-haul rates *for the future.* The tariffs not be-

ing unlawful *per se,* the District Court had no jurisdiction to fix the rates or practices so as to have them differ from what was specifically provided by the tariffs published and on file with the Commission.[3]

The Supreme Court has long recognized and adhered to an important distinction between that class of cases in which the courts may hold a practice or rate of the carriers unlawful and give an order for damages based thereon and those cases peculiarly and exclusively for the Commission. In *Mitchell Coal & C. Co.* v. *Pennsylvania R. Co.,* 230 U. S. 247, 57 L. ed. 1472 (1913), the Court, in dealing with a questioned allowance, stated the principle, p. 1475, that:

> "the legal quality of the practice complained of may not be definitely fixed by the statute, so that an allowance, otherwise permissible, is lawful or unlawful, according as it is reasonable or unreasonable. But to determine that question involves a consideration and comparison of many and various facts, and calls for the exercise of the discretion of the rate-regulating tribunal. The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid."

The effect of the Commission's reports and the decisions of the Supreme Court in the *Pan American* and *American Sheet and Tin Plate Cases,* is to say that for the future the carriers shall not render a service beyond the interchange tracks without making some charge over and above the line-haul rate therefor. The basis for this legislative decree is that to render such service without additional charge would be to give a preferential service. Such a finding is the exclusive function of the Commission, as was decided in *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S.

[3] This has been clearly held in a case involving a situation almost identical with the present, *American Sugar Refining Company* v. *Delaware, L. & W. R. Co.,* discussed below.

426, 51 L. ed. 553 (1907), where the Supreme Court clearly and permanently established the proposition that the reasonableness of a rate or practice is exclusively within the jurisdiction of the Commission and that the courts have no power to give reparation upon the basis of a finding of unreasonableness in the rates or charges. The later case of *Robinson* v. *Baltimore & O. R. Co.*, 222 U. S. 507, 56 L. ed. 288 (1912), enlarged upon the decision in the *Abilene Cotton Oil Case*, the Court further holding, p. 511:

> "It is true, as was urged in argument that in that case the complaint against the established rate was that it was unreasonable, while here the complaint is that the rate was unjustly discriminatory. But the distinction is not material. The power of the Commission over the two complaints is the same."

See also:

Southern R. Co. v. *Tift*, 206 U. S. 428, 51 L. ed. 1124 (1907);

J. C. Famechon v. *Northern Pac. R. Co.*, 23 F. (2d) 307 (1927);

Chicago, B. & Q. R. Co. v. *Merriam & Millard Co.*, 297 F. 1 (1924).

V.

The District Court Had No Power to Enforce Retroactively a Cease and Desist Order of the Commission.

We have argued above that the Commission and the Commission alone has power to prescribe for the future a change in rate or transportation practice such as was here involved; the Court does not have such power. Furthermore, the Commission having so ordered a change in practice, the District Court would have power to enforce that order only in a suit in equity properly before the Court. This is not such a suit, since the only issues presented by the pleadings were as to the validity of the Commission's order and no prayer was entered seeking an enforcement thereof.

However, assuming *arguendo* that the Court might properly of its own motion enforce the Commission's order, in addition to dismissing the bill of complaint seeking an injunction restraining such enforcement, it would only be proper and lawful for the Court to enforce the cease and desist order *strictly according to its terms.*

Paragraph 2 of Section 15 of the Interstate Commerce Act provides:

> "All orders of the Commission * * * shall take effect within such reasonable time, not less than thirty days, * * * as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a Court of competent jurisdiction."

In this case the District Court enjoined the enforcement of the Commission's orders. In addition thereto, the Commission postponed the effective dates of its orders, *not* pending the determination of the injunction suits, but to a definite and fixed time in the future. It is not necessary for this Court to decide here whether the District Court might properly unwind its prior action and give effect to the cease and desist orders as of the date of the interlocutory injunctions, on the theory that those injunctions had prevented the orders from taking effect. This is not such a case because of the fact of postponements by the Commission. If the Commission had thought that its orders should take effect without postponement and had intended to so urge in the event that the suits were dismissed, it would not have postponed the orders.

On the contrary, the Commission's postponement of its orders clearly had no direct causal relation with the injunctions. In No. 228 there were two postponement orders *before*—any injunction was entered, one even before a suit was filed. No. 227 was one of the earlier cases in the whole program, and the single postponement of the cease and desist order in that case was, in the light of the consistent action in other cases subsequent thereto, obviously not so

much in contemplation of the injunction in that case as it was to hold the *status quo* pending the outcome of the country wide litigation which terminated in the *American Sheet & Tin Plate* and *Pan American* cases, *supra.* The District Court plainly has no authority to disturb this *status quo* by decreeing that the orders should be effective at some other and prior date than that fixed by the Commission.

To remove the effect of its preliminary injunction and give effect to the Commission's orders in these cases the Court would have to direct the carriers to cancel the allowance tariffs and cease paying the allowances *on June 15, 1937,* and cannot properly fix any earlier date.

In *United States* v. *Baltimore & O. R. Co.,* 284 U. S. 195, 76 L. ed. 243 (1931), the Supreme Court held an order of the Commission inoperative because it violated the above quoted Section 6 of the Act by attempting to prescribe retroactively the divisions of rates to be observed between connecting carriers. And the Court further refused to give effect to a later valid order as of the date when the original order could have been made effective, saying, page 203:

> "The courts may not usurp the function of the Commission and say one of its orders shall become effective thirty days, a hundred days, or at any other time after entry. An order must take effect as prescribed; its effective date, if any, is the one actually appointed not one which might have been. Unless and until the Commission duly designates a lawful date no carrier can know what is required and the courts cannot command obedience."

AMERICAN SUGAR REFINING CASE.

Taking the situation here presented as a whole, the disposition of these cases for which we have been contending is in all its essentials supported by a decision of Circuit Court of Appeals for the Third Circuit rendered in *American Sugar Refining Co.* v. *Delaware, L. & W. R. Co.,* 207 F. 733 (1913). In that case the shipper sued to recover

a published allowance for a period subsequent to a report of the Interstate Commerce Commission condemning the allowances as "rebates." The Commission had not entered an order, but stated in its report that the carriers would be expected to conform their tariffs to the principles announced in the report. This the carriers did not do.

Observing that the tariffs were duly filed and lawfully published under Section 6 and that they provided for an allowance as stated in the complaint, the Court observed, p. 740:

> "There is no pretense that any 'refund' or 'remittance' in any manner or by any device has been made of any portion of the through rates stated in the schedule *except 'such as are therein specified,'* as specially provided for in the act, and there is no suggestion that the schedule filed omits 'any rules or regulations which in anywise change, affect, or determine any part or the aggregate of the rates, fares, and charges' provided for therein."

With those circumstances in mind, the Court then noted the lack of an outstanding effective order by the Commission and observed further, p. 741:

> "The mere opinion of the Commission, as to the character of the deduction or allowance mentioned in the schedule, could not, ipso facto, affect the validity of the same, in face of the positive requirements and prohibitions of the statute in regard to changes in rates which have been filed and published by a common carrier."

The Court then reversed the decision of the District Court and ordered judgment to be entered in favor of the plaintiff for the full amount of the claim.

We submit that this case is of controlling importance here since it represents the decision of a Circuit Court of Appeals that an allowance, which is not a secret rebate but is provided for in published schedules, must be paid.

Counsel for appellees may argue that the case is distinguishable on the grounds that there was no order issued by the Commission, whereas in these cases the Commission issued cease and desist orders. Such a distinction is not material however, in the face of the fact that the Commission fixed the effective date of its various order herein as June 15, 1937.

Until that effective date, the situation in the two cases is the same, *i. e.*, no *effective* order was outstanding against the observance of the tariffs. This is true in these cases because of the express provision of Section 15, paragraph (2). An order does not operate until by its terms it becomes effective. In the *Refining Co.* case it was equally true because of the corollary proposition that a mere report condemning a practice provided for in published tariffs does not of itself make the practice unlawful so long as there is no effective order requiring the cancellation of the inhibited tariffs. In this the *Refining Co.* decision is supported by *North American Co.* v. *St. Louis & S. F. R. Co.*, 288 F. 612 (1922), at page 618:

> "A report or an opinion of the Interstate Commerce Commission without an order to change established rates neither authorizes nor permits a departure therefrom."

VI.

The Principle of Restitution Has No Application to These Cases.

In the absence of the required findings and conclusions of law by the lower Court on this phase of its decrees, it is impossible to determine other than speculatively upon just what basis the Court intended to found its action. It cut off the allowances on its own motion as of the dates of the interlocutory injunctions [4] and, as we have argued, in so doing it erred in that it necessitated the violation of the

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[4] These dates were over a year apart, August 28, 1935 and December 2, 1936. (R. 78, 131.)

printed and published tariffs. This cannot be justified on the ground that the Court was enforcing orders of the Commission, because it did not enforce those orders according to their terms. Furthermore, the Court did not have power to enforce orders of the Commission other than according to their terms and the power to do what the Commission did was exclusively the Commission's.

It was argued in the District Court by appellees that the Court should go the full extent of its power in order to give the defendant carriers every advantage and benefit which, but for the interlocutory injunction, they would have enjoyed under the orders of the Commission. The argument in support of this position was based largely upon the opinions of this Court in *Baltimore & Ohio R. Co. v. United States*, 279 U. S. 781, 73 L. ed. 954 (1929), *Atlantic Coastline R. Co. v. Florida*, 295 U. S. 301, 79 L. ed. 1451 (1935).

The principle on which these cases were decided is one upon which the lower Court may have based its decrees as they now stand. It is clearly expounded in the opinion of the Supreme Court in the *Atlantic Coast Line* case, *supra*, page 309; the rule is that "what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error." The essence of these cases is the return of something which was lost through the compulsion of a later reversed judgment.

Upon the authority of these cases, it was argued, the Court should "put the carriers in the same position they would have occupied except for the interlocutory injunctions," by directing the carriers to retain the "sums of money which but for the interlocutory injunction would have remained in their general funds." This on the theory that the original interlocutory injunctions had restrained the cancellation of the allowances so that the Court should now correct the effect of its error in granting the interlocutory injunctions in the light of its final determination that the underlying orders of the Commission were valid. The deficiency in this argument, and an obvious error of fact, is

that there was a total lack of compulsion upon the carriers to publish the allowances, which compulsion is the essence of the restitution principle. The circumstances in these cases are plainly contradictory of any allegation that the allowances were published or maintained because the Court commanded the carriers to publish or maintain them. These allowances have been published in tariffs and paid for many years past in each case by the voluntary act of the individual carriers. In each case the carriers published cancelling supplements only because of the Commission's order requiring them to cease and desist from the practice, and, whenever the Commission postponed the effective date of its order, the carriers consistently postponed cancellation of the allowances.

Accordingly, in No. 228, where the Commission postponed the effective date of its order to October 15, 1936, and later, to December 15, 1936, and again to June 15, 1937, the Chicago and Illinois Western and the Belt Railway each immediately published supplements postponing the cancellation of the allowance tariffs as long as possible. *The first two of these postponements were before any injunction was entered.*

The preliminary injunction was entered on December 2, 1936, while the Commission's order was at that time to be effective December 15, 1936. The carriers thereupon further postponed their cancellation tariff and *in addition thereto,* the Commission postponed the effective date of its order to June 15, 1937.

The facts are similar in No. 227, except for the chronology of postponements, and it was subsequent to the interlocutory injunction that (a) the Commission postponed the effective date of its cease and desist order; and (b) the carrier filed a new supplement with the Commission, postponing the effective date of the cancellation of the allowance tariff.

It was argued by appellees below, that the injunction in No. 227 restrained the cancellation of the allowance, and

that this fact destroyed the voluntary character which appellants attribute to the tariffs. The answer to that argument is that the carrier established its willingness to continue the allowances, so long as not prohibited by the Commission, by affirmatively restoring the tariffs.

Under these circumstances, it is a violent stretch of the facts to say that the allowances would have been cut off but for the preliminary injunction. On the contrary, if the preliminary injunctions had not been entered, the allowances would necessarily have been paid at least down to the effective date of the Commission's orders, June 15, 1937. Plainly, the only compulsion upon the carriers was the compulsion of the Commission's order. The injunctions only compelled the carriers to retain the money, and they should now be left free to make settlement with the industries in accordance with the tariffs, and in compliance with the cease and desist orders.

VII.

The Decrees of the District Court Are Contrary to Equity and Good Conscience.

If the decrees of the District Court were, in fact, based upon some loose concept of the equitable principle of restitution, there is, in addition to the obvious inapplicability of such principle which we have already pointed out, the added reason for denying the contention of counsel for appellees, that to do so would be grossly inequitable under the real circumstances in the case.

In the first place the request for restitution comes. not from the carriers to whom the restitution would be made, but from the Interstate Commerce Commission. The carriers themselves, though named as defendants below and appellees herein, have taken no part in the prosecution or defense of these suits and have laid no claim to retaining the allowances which their tariffs provided should be paid to the appellant industries. Surely equity will not go out of its way to give a money judgment to a party who does

not ask for it, and who is not entitled to ask it because in default of pleading.

The very title of the Commission's proceeding, *Practices of Carriers Affecting Operating Revenues or Expenses,* clothes the condemnation of the terminal practices out of which these suits arose in the character of an attempt to save the carriers' revenues. This is unquestionably a laudable purpose and its spirit is inherent in the above mentioned contention of counsel that the District Court should go the full extent of its power in order to give the defendant carriers every advantage and benefit. And in the absence of the usual clues as to what impelled the decrees of the District Court, the resulting necessary speculation leads inevitably to a consideration of the possibility that the court gave more than passing consideration to the familiar revenue needs of the railroads.

However, this is not a case in which the financial condition of the parties should be a determining factor; and if it were, it would be extremely unfair to assume the needs of the railroads, and without any evidence upon the subject to assume to the contrary that the industries were fat corporations.

If it is fair to take notice of the financial needs of the carriers who are parties in these proceedings, it is only fair to assume that the financial needs of the industries, in times of depression, are equally pressing.

As a matter of law, these considerations have no place in the deciding of the issues presented. What does have an important bearing upon the exercise of the discretion of a court of equity as to the terms and conditions upon which it may require a settlement of a controversy submitted to its jurisdiction are the facts and principles which we have urged upon this Court above.

Further appealing to the conscience of equity is the consideration that the cease and desist orders which the Commission entered, and which have been sustained by the courts, bring about a complete revolution of transportation

practices at the plants of the industries affected. This revolution is not confined solely to the amount of money to be paid or the quantum of service which the railroads shall render the appellants; it also involves the physical practices and everyday problems surrounding the handling of a very large volume of carload traffic. In the total absence of any aspect of villainy or moral turpitude on the part of either the industries or the railroads, we submit that elementary common sense dictates an orderly and cooperative readjustment to the new prescribed practice.

The orders of the Interstate Commerce Commission, as postponed to June 15, 1937, do provide, so far as the four Chicago industries are concerned, a uniform time for effectuating this new practice. The carriers have not been defiant of these orders and have at all times exhibited a readiness to comply therewith, *when effective.*

The decrees of the District Court should be reversed and the cases remanded with instructions to modify the decrees simply to dismiss the bills of complaint and set aside the interlocutory injunctions.

NUEL D. BELNAP,
JOHN S. BURCHMORE,
Solicitors for Appellants.

December 12, 1938.

APPENDIX.

The Interstate Commerce Act.

(Being the Act to Regulate Commerce as Amended)

U. S. Code, Title 49, Chapter 1

Sec. 6 (3) No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided,* That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further,* That the Commission is hereby authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its judgment, not inconsistent with the public interest.

Sec. 6 (7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in ac-

cordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Sec. 15 (2) Except as otherwise provided in this part, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.